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No. 88-856 (8)

In The

Supreme Court of the United States

October Term, 1988

CORRECTED COPY

PETER CHEMA,

Petitioner,

v.

UNITED STATES OF AMERICA and YONKERS BRANCH – NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

BRIEF FOR PETITIONER

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QUESTIONS PRESENTED

1. Whether a district court abuses its power by compelling a local legislator to vote to adopt local legislation in an attempt to remedy violations of the federal constitution where less intrusive means are available.

2. Whether a local legislator is entitled to legislative immunity for his vote on a local ordinance.

3. Whether the First Amendment prohibits a district court from restraining a local legislator from voting on local legislation according to his conscience.

4. Whether it is an abuse of the contempt power for a district court to hold a local legislator in civil contempt for not voting to implement a consent decree to which he did not consent, and which was agreed to by others only after the district court threatened to impose sanctions for contempt.

5. Whether it is an abuse of the contempt power for a district court to hold a local legislator in civil contempt for failing to vote in favor of specific legislation implementing a consent decree when the consent decree imposed no such obligation because it explicitly left intact the legislator's right to exercise legislative discretion.

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On Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

BRIEF FOR PETITIONER

Petitioner, Yonkers City Councilman Peter Chema, respectfully prays that this Court reverse the judgment and decision of the United States Court of Appeals for the Second Circuit entered on August 26, 1988.[1] That

[1] The parties to the proceeding below were Councilmen Peter Chema, Henry Spallone, Nicholas Longo and Edward Fagan, the United States of America, Yonkers Branch – National Association for the Advancement of Colored People (hereafter "NAACP"), City of Yonkers, Yonkers Board of Education and Yonkers Community Development Agency.

judgment and opinion affirmed as to Councilman Chema and the three other councilmen, and affirmed as modified, as to the City of Yonkers, the orders dated July 26 and August 2, 1988 of the United States District Court for the Southern District of New York, directing the councilmen to vote in favor of local zoning legislation, and adjudging them in civil contempt and imposing coercive monetary sanctions and imprisonment if they did not do so.

OPINIONS BELOW

The opinion of the Court of Appeals for the Second Circuit is reported at 856 F.2d 444 (2d Cir. 1988); a copy is reprinted in Exhibit E of the appendix to Councilman Chema's petition for a writ of certiorari. The orders of the United States District Court for the Southern District of New York are unreported; they are reprinted in the Appendix pp. 397-400, 445-47.[2]

JURISDICTION

The Court of Appeals' order was entered on August 26, 1988. Councilman Chema's petition for a writ of certiorari was filed on November 23, 1988, and was granted on March 6, 1989. The jurisdiction of this Court rests upon 28 U.S.C. § 1254(1), reprinted in the Statutory Appendix hereto.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

U.S. Const. Art. I, § 6, cl. 1; U.S. Const. amend. I; U.S. Const. amend. V; U.S. Const. amend. XIV, § 1; and

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[2] References to "Appendix" refer to the Joint Appendix.

Charter of the City of Yonkers, article III, § C 3-1A are set forth in the Statutory Appendix to Councilman Chema's petition for a writ of certiorari. Fed. R. Civ. P. 52(a) is reprinted in the Statutory Appendix hereto.

STATEMENT OF THE CASE

The United States brought this case in 1980, claiming that the City of Yonkers (the "City") and the Yonkers Board of Education had intentionally created or maintained racial segregation in the City's housing and schools. On November 20, 1985, the District Court issued its liability ruling, finding that a concentration of subsidized segregated housing in the Southwest section of the City was "the result of a pattern and practice of racial discrimination" by City officials. *United States v. Yonkers Bd. of Ed.*, 624 F. Supp. 1276, 1373 (S.D.N.Y. 1985). On December 28, 1987, the Court of Appeals affirmed the judgment of the District Court with respect to liability and also affirmed the District Court's remedial order, Appendix pp. 19-34, known as the Housing Remedy Order. *United States v. Yonkers Bd. of Ed.*, 837 F.2d 1181 (2d Cir. 1987), *cert. denied*, ___ U.S. ___, 108 S. Ct. 2821 (1988). Neither the petitioner councilmen nor the City Council (the "Council") were parties to the case.

In January 1988, Councilman Chema began his term as a councilman for the Second District on Yonkers' West Side after having been elected in November 1987. He had previously served two terms as a councilman during 1980-1984, when he represented the First Ward also on the City's West Side, which then contained most of the City's subsidized housing. Appendix p. 506. Councilman Chema has long been an advocate of decent housing for those whom he was elected to represent. For example, during his first term as a councilman, he travelled with some of his constituents by bus to New York City to testify in a civil suit on their behalf. He testified that,

based upon his observations as well as college education in civil engineering, the housing conditions on the West Side were substandard. Appendix p. 506.

None of the court-ordered housing in this case will be built in areas represented by Councilman Chema. Appendix p. 506.

On January 19, 1988, shortly after Councilman Chema took office, the District Court threatened the City with bankrupting fines if it did not comply with its housing remedy order. At that time, there was some question as to whether the City had adopted a housing assistance plan ("HAP") for the City to qualify for federal funds to construct 200 units of subsidized housing. Appendix pp. 171-75. On two previous occasions, the District Court had "deemed passed" two such housing assistance plans, causing the Department of Housing and Urban Development ("HUD") to release $19,760,000 to the City. Appendix p. 174. The third housing assistance plan would have caused the release of $10,184,000 to the City. *Id.* At the hearing, a representative of HUD advised the District Court that the City had already taken steps to "prepare for the 200 units . . . [and] it would appear that they are in compliance." Appendix p. 173. At that time, the District Court perceived that it had only two options:

> There are two techniques by which the court can proceed. It can proceed by deeming things to have been done which it was the obligation in the first instance of Yonkers to do, or it can order Yonkers to do those things.

Appendix p. 175. Without making a finding of fact as to whether the HAP was current, the District Court chose to order the City to adopt a new HAP, and threatened the City with contempt sanctions if the Council failed to do so:

> Yonkers will comply with the housing remedy order or it will be in contempt, it will be in bankruptcy . . . Yonkers is in a state of crisis. It is tottering on the brink of having its elected

> officials replaced by appointed officials . . . I direct that no elected representatives of the City of Yonkers remove himself from the jurisdiction of this Court pending a resolution of this issue.

Appendix pp. 176, 182-83.

This extraordinary threat, including the threat to remove elected legislators from office, and the deprivation of their right to travel, had its intended effect. That afternoon, the councilmen present in court announced their intention to adopt a housing assistance plan, Appendix p. 183, and later did so.

During the proceedings on January 19, 1988, the District Court stated that "a consensual resolution to this is preferable to the type of confrontational order which has typified these proceedings," Appendix p. 179, and gave the parties time to arrive at a consent decree. Appendix pp. 184-85. The discussions which led to the Consent Decree nine days later took into account the only alternative described graphically by the District Court:

> I say again to Yonkers, here is the issue in a clear and simple form. It does not deal with any details or niceties with respect to particular sites. It deals with the overall commitment to comply with the orders of the court, and if the Yonkers City Council is not prepared to do that, don't pass the HAP and you will by the process which I have indicated discover that the construction of the housing will go forward but it will go forward under *the most expensive, the most divisive, conditions possible.*

Appendix p. 178 (emphasis added). In the absence of a consent decree, the District Court was prepared "to execute an order which will move this forward." Appendix pp. 184-85.

On January 28, 1988, the City entered into a "First Remedial Consent Decree in Equity" (the "Consent Decree"), the terms of which required the City to take

certain implementing action, including adoption of zoning legislation, which would allow the placement of the court-ordered housing in specified areas:

> The City agrees to adopt, among other things, legislation . . . providing for zoning changes to allow the placement of such developments, *provided, however, that such changes are not substantially inconsistent with the character of the area.*

Consent Decree, ¶17(d), Appendix p. 222 (emphasis added).[3] Councilmen Chema and Spallone cast the two votes against entering into the Consent Decree. Appendix p. 506.

The Housing Remedy Order required the City to develop and implement a plan known as the long term plan for the creation of assisted housing. Appendix p. 30. When negotiations over the long term plan were discontinued, the United States and the NAACP moved to have the District Court enter an order incorporating a long term plan. Appendix p. 245.

On May 16, 1988, the City submitted its opposition to the entry of the long term plan order because the plan was too restrictive, and more flexibility with respect to both the number of assisted units in each development and the architectural integration of those units was needed. Appendix pp. 245-61.

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[3] Months earlier, the District Court acknowledged its authority to supersede Yonkers' zoning laws. On May 12, 1987, the District Court proposed that the Council adopt a resolution waiving or superseding "any zoning requirements, need for variances or other local governmental approval." Appendix p. 91. The Council declined to adopt such a "waiver" resolution, causing the District Court to observe that a federal court in implementing a housing order may supersede local zoning codes and ordinances. Appendix p. 105. In the context of events leading to acceptance of the Consent Decree, the District Court must have been aware that the Council intended to reserve this authority with respect to zoning.

On June 13, 1988, the District Court issued a Long Term Plan Order which addressed such issues as a legislative package of incentives for developers and the number, distribution and location of court-ordered housing units, as well as affordability and occupancy criteria. Appendix pp. 303-16. The District Court found that the City had not enacted legislation described in paragraph 17 of the Consent Decree, and ordered the City to take certain actions to effect the purposes and terms of the Consent Decree. Appendix pp. 303-16. The Long Term Plan Order did not direct the enactment of legislation in general, or zoning legislation in particular. The order continued to leave discretion with the City with respect to the impact of court-ordered housing on the surrounding area:

> The City shall foster (to the extent feasible) the use of such architectural and design devices as will minimize the visual impact of such housing developments on the surrounding community and any distinction between assisted and market units.

Appendix p. 309. In May, the City retained Abeles Schwartz Associates, a firm with fourteen years of experience in drafting zoning legislation to effectuate court-ordered housing remedies, normally on behalf of plaintiffs. Appendix pp. 331, 338. As of June 21, 1988, the Abeles firm had not yet begun to draft the legislation for the City. Appendix p. 332. Peter Abeles, a principal in the firm, told the District Court that, based upon his experience, an ordinance would not be workable unless it took into account the economic, land use and marketing factors in the particular community, especially in an urban setting such as Yonkers. Appendix p. 331.

Mr. Abeles believed that his mandate was to produce an ordinance "tailor made" to Yonkers. Appendix p. 331. He told the District Court that the 1983 New Jersey Supreme Court decision in *Southern Burlington Co. NAACP v. Township of Mount Laurel*, 92 N.J. 158, 456 A.2d

390 (1983) prompted the enactment of about one hundred local zoning ordinances in New Jersey, but that only "a quarter or a third" of those were producing the intended results.[4] Appendix p. 338. The results were especially disappointing in the more developed parts of the state. Mr. Abeles did not want the same fate for the Yonkers ordinance. *Id.*

Concerned with further delay, both the NAACP and the Government wanted the Council to pass a resolution as a sign of its willingness to enact the legislation. Appendix pp. 332-33. The City urged the Court not to order the Council to vote on legislation sight unseen, because such an order would "backfire" and the Council was unlikely to pass such a resolution. Appendix p. 333. The District Court requested that such a resolution be placed before the Council for its action, but the District Court did not order its adoption. Appendix p. 337.

On June 28, 1988, the Council defeated, by a vote of 5 to 1, a resolution put on the agenda at the direction of the District Court, which would have committed the Council to enact the legislation called for by the Consent Decree and the Long Term Plan Order. Appendix pp. 345-46. Councilman Chema voted against this resolution. Appendix p. 346.

Following the defeat by the Council on June 28, 1988, of the proposed resolution, the District Court entered an order, dated June 29, 1988, directing the Department of Justice and the NAACP to submit by July 5th a proposed order "requiring Yonkers to take specific implementing action pursuant to a prescribed time-table, on penalty of a finding of contempt and the imposition of bankrupting fines." Appendix p. 348.

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[4] In *Southern Burlington Co. NAACP v. Township of Mount Laurel*, 92 N.J. 158, 356 A.2d 390 (1983), the New Jersey Supreme Court held that zoning ordinances that exclude housing for low and moderate income people violate New Jersey's constitution.

On July 5, 1988, the United States and the NAACP submitted a joint motion requesting entry of an order which set forth four specific actions to be taken by the City, among them:

> The adoption, by July 19, 1988, of the necessary zoning legislation to implement § 17 of the First Remedial Consent Decree in Equity and the Long Term Plan Order. . . .

Appendix p. 350. The City opposed the proposed order because it would have directed the Council to adopt the zoning ordinance then being drafted by the Abeles firm, but not yet finished. Appendix p. 351. Rather, the City urged the District Court, as opposed to the Council, to adopt the "necessary changes or additions to the Yonkers zoning ordinance necessary to implement the Long Term Plan Order." *Id.*[5]

The Department of Justice opposed the City's recommendation that the Court, rather than the Council, should act:

> [T]he City Council of Yonkers simply does not want to take any responsibility for carrying out the law.
>
> They want to flout the court's orders. They want to make all kinds of statements in the press and everywhere else about your Honor, about the orders, about what they are not going to do and they want once again to be let out from under having to do anything so they don't have to explain to their citizens why they are doing something or not doing something. . . .We believe that the Court has to send a message to the City. . . .

Appendix p. 361.

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[5] In support of its position, the City cited that part of the Court of Appeals' decision in which it was held that "it was appropriate and prudent for the court . . . to deem the City to have chosen sites selected by the court if the City failed to meet [a] deadline." *United States v. Yonkers Bd. of Ed.*, 837 F.2d 1181, 1237 (2d Cir. 1987).

The NAACP took the position that contempt sanctions were not justified. Appendix p. 370. Furthermore, the NAACP argued that the proposed zoning legislation, which was still being drafted, Appendix p. 376, was flawed for two reasons: first, it provided no process for adjudicating claims of affected property owners and, second, it did not provide that a proposed housing commission have access to the staff of the Yonkers planning board. Appendix pp. 364, 366.

The District Court found "useful" the City's suggestion that the court itself adopt a zoning ordinance, but announced that it was also considering an order creating a commission with specific powers, as well as adopting the Affordable Housing Ordinance (the "Ordinance") along the lines then being drafted by the Abeles firm. Appendix pp. 357-59. Finally though, the District Court simply adjourned the matter until July 26th, making the following observation:

> The problem before this court is not whether it has the power to effect its remedies. It has vast powers. Bankrupting Yonkers is simply one of them.
>
> * * *
>
> The suggestion of the commission, and it is only a suggestion, is not viewed by this court as a retreat from the exercise of power. It is simply an alternative means of accomplishing what is the prime objective. The prime objective is not a civics lecture. I have given too many of those. The objective is to get some housing built.

Appendix pp. 369-70. On July 26, 1988, the District Court chose to force the Council to act, thus making good on its threat made in January to follow "the most expensive, the most divisive" route to the housing remedy. *See* Appendix pp. 397-400.

On July 26, 1988, the District Court considered a draft of the Ordinance which would have permitted the construction of court-ordered housing in areas not permitted by existing zoning laws. The NAACP and the

Government took opposing views concerning whether the creation of a commission or the exercise of the contempt sanction would best effect the purposes to be served by the housing remedy order. The Government sought contempt; the NAACP appointment of a commission. The District Court explicitly framed the commission route which the NAACP advocated:

> When I [Judge Sand] advanced this suggestion I talked about a commission which would take all of the rights, powers, and jurisdiction of the City Council in any and all matters relating to housing pursuant to the housing remedy orders.

Appendix p. 389. With eloquence, conviction and common sense, the NAACP urged the District Court to focus on the need for housing, not vindication, and in the process defended the councilmen's First Amendment rights:

> I just take strong exception at this stage in this lawsuit to the continued invocation of threats of judicial action as opposed to structural change . . . [T]he fundamental need of judicial power in this situation is to ensure rights . . . There is no reason to believe that if the City Council passes this ordinance it . . . will have any significance whatsoever for the City of Yonkers in implementing this order. In fact, it will simply create a precedent that every time you want to do something we should push them to the wall. That is craziness . . . We don't need to pay attention to Henry Spallone. His position on these issues – I assume they're based on principle – have been overruled by this Court. He can continue his opposition. He can continue to speak against the proposals. I'm sure he will and as an American citizen he has a right to do it.

Appendix pp. 389-91. The Government, on the other hand, urged contempt, literally as a means to silence voices from within the Council expressing the interests of their constituents:

> The government and NAACP have a basic disagreement here . . . . We believe that failure of this court to move forcefully right now to take action to make sure its orders are obeyed will only strengthen the opposition, the obstruction, and will basically allow city officials to openly enflame community opposition. It's easy to say that the City Council – let them yell and scream, say what they want, you know words aren't going to hurt you. But here, your honor, the words of language, Henry Spallone or Nick Longo, are more than words. They're rallying cries.

Appendix p. 393. The City advised the District Court that the Council could not consent to the creation of a commission because the Council had no authority to abdicate or delegate legislative powers conferred by state law. Appendix pp. 378, 393. The District Court adopted the Government's position, which the City characterized as "more punitive than remedial," Appendix p. 392, and gave Yonkers five days – until August 1st – to enact the Ordinance (the text of which had not been finalized until that very day, Appendix pp. 380, 382) or face "bankrupting fines." Appendix p. 395.

The District Court ordered the City and the individual councilmen to show cause why they should not be held in contempt if they failed

> to enact, on or before August 1, 1988, the legislative package relating to the long term plan as described in Section 17 of the First Remedial Consent Decree in Equity dated January 28, 1988 and the Long Term Plan Order dated June 13, 1988.

Appendix p. 398.

The July 26, 1988 order further provided that if the City failed to enact the legislative package by August 1, 1988, each councilman "who fails to vote in favor of" the legislation would be fined $500 per day and later imprisoned until the City enacted the legislation or he changed his vote. Appendix pp. 394-95, 398-99.

On July 28, 1988, the District Court stated in a letter to all counsel that the July 26, 1988 order would be satisfied if the Council adopted a resolution, on or before August 1, 1988, committing itself to enact the Ordinance within the minimum time required by state law for public notice and hearing. Appendix p. 401. This modification of the July 26, 1988 order varied the terms of the Consent Decree, however, because it directed the councilmen to vote for the Ordinance as drawn, without regard to whether the Ordinance would create changes substantially "inconsistent with the character of the area." *See* Appendix p. 222.

On August 1, 1988, at a special Council meeting, Councilman Chema voted against adoption of the resolution because the Ordinance did nothing to remedy existing substandard housing for his constituents on the West Side where many minority group members live:

> How can I as an elected official be forced to vote on something that I've never voted on or supported before? I feel my constitutional rights are being violated tonight. I feel we find ourselves in this imbroglio because the judge has turned a deaf ear towards the fact that the remedy is not a remedy that serves the whole city. We need money on the West Side of town to fix up debilitated and severe housing conditions that exist. The decree serves no one well. As I went through the areas of the city I found that the West, many, many Westsiders in my district wanted to see the areas along the waterfront, along Radford Street, along all the areas that I represent, and along all the West Side, to be fixed up.

Tape recording referred to in Transcript of August 4, 1988, Appendix p. 452.

Councilman Chema was not alone in believing that the Consent Decree could actually have an adverse impact on Yonkers' West Side. Stonewall Odom, who

described himself as an activist from the black community, along with others who shared his views, Appendix p. 186, urged the District Court to consider the impact that the court-sponsored population relocation plan would have on the black community:

> We are asking, your Honor, that you withhold any decision as to housing in the City of Yonkers until we, as the members of the black community, are allowed to have some input into our fate. Your decision in this court affects us and our children. Our children are bussed against their will and we stand a chance of losing our community by simply transferring poor people to the white community from the west side of Yonkers.

Appendix p. 186.

On August 2, 1988, the District Court adjudged Councilman Chema in civil contempt without a hearing, and ordered him to pay a fine of $500 per day and, on the tenth day, to be imprisoned until he purged himself of the contempt by voting in favor of the Ordinance. The District Court also held the City in contempt and levied "bankrupting" fines against it. Appendix pp. 445-50. The District Court acknowledged the unprecedented character of its July 26th order:

> I know of no parallel for a court to say to an elected official, you are in contempt of court and subject to personal fines and may eventually be subject to personal imprisonment because of a manner in which you cast a vote. I find that extraordinary.

Appendix p. 433.

On August 9, 1988, the Court of Appeals denied Councilman Chema's request for a stay of that portion of the District Court's order which required weekly Council votes on the Ordinance. Appendix pp. 499-500. Councilman Chema believed that repeated votes were not in the public interest. Appendix p. 507. In one such voice vote,

Councilman Chema voted against the Ordinance and said:

> I cast my vote in the exercise of my First Amendment right to freedom of speech and to vote. I also cast my vote as a representative of my constituents to give meaning to their First Amendment right to petition the government through their elected officials.
>
> I vote today because I have been ordered to do so. My conscience will not permit me to vote "yes" because I have been ordered to do so.
>
> I do not act out of disrespect for the federal court, but out of respect for the Constitution which I believe is the supreme law of the land.

Appendix p. 507.

On August 26, 1988, the Court of Appeals affirmed the judgment of the District Court as to the councilmen and affirmed the judgment, as modified, as to the City. The Court of Appeals set a cap of $1 million a day on the City's fines. It also stayed the issuance of its mandate until September 2, 1988, to permit application to this Court for a stay of the contempt sanctions pending filing and consideration of a petition for a writ of certiorari. *United States v. City of Yonkers*, 856 F.2d 444 (2d Cir. 1988).

On September 1, 1988, this Court granted Councilman Chema's stay application pending the timely filing and disposition of a petition for a writ of certiorari, but denied the City's application for a stay. *United States v. Chem* __ U.S. ___, 109 S. Ct. 14 (1988), Appendix pp. 512-22.

On September 9, 1988, by a vote of 5 to 2, the Council adopted a resolution declaring its intention to pass the Ordinance. Appendix p. 529. The Council reserved the right to seek the District Court's permission to amend the Ordinance to insure that court-ordered housing "shall not be inconsistent with the current character of the neighborhood in which they are to be built." Appendix p. 530. Councilman Chema voted in favor of the resolution.

On September 10, 1988, after the City had paid more than $800,000 in fines, and was facing imminent layoffs of many municipal employees and suspension of essential municipal services, the District Court lifted contempt sanctions against the councilmen and the City. Councilman Chema has personally paid fines totalling $3,500, none of which has been refunded. Appendix pp. 395, 398-99, 557. He was not imprisoned.

SUMMARY OF ARGUMENT

Several important issues which involve the very nature of our system of constitutional representative government are distilled in this case. The District Court, in seeking to remedy violations of the constitutional rights of one class, violated fundamental First Amendment rights of Councilman Chema, intruded upon the legislative immunity of a local legislator, and deprived the electorate of its rights to untrammelled representation.

The law, as the cornerstone of our constitutional system of shared power, is offended when the federal judiciary exceeds the mandate to use the least intrusive means to effect remedial measures.

It is this Court's role to reestablish the proper balance between the exercise of judicial power and individual constitutional rights.

I. A court is obliged to use the "least possible power adequate to the end proposed," including the election of contempt sanctions, to effect its orders, *Shillitani v. United States*, 384 U.S 364, 371 (1966) [*quoting Anderson v. Dunn*, 19 U.S (6 Wheat.) 61, 69 (1821)]. In protecting the Fourteenth Amendment rights of one party, the court must be punctilious in safeguarding the constitutional rights of the other parties. To achieve the mandatory balancing of rights, remedial measures should be no broader than necessary to correct the constitutional violation. *Milliken v. Bradley*, 443 U.S. 267, 280 (1977);

Swann v. Charlotte-Mecklenburg Bd. of Ed., 402 U.S. 1 (1971).

Here, the District Court took the *most* constitutionally intrusive course of action by ordering Councilman Chema how to vote, thereby unnecessarily depriving him of his First Amendment rights and his rights as an elected legislator, and infringing his constituents' rights to unfettered political representation. In so doing, the District Court eschewed alternative, far less intrusive methods, including establishing a "fair housing commission" and superseding Yonkers' existing zoning law, to achieve the end of building affordable, desegregated housing.

II. Councilman Chema is entitled to absolute legislative immunity for his legislative vote. In *Lake Country Estates v. Tahoe Planning Agency*, 440 U.S. 391, 405-06 (1979), this Court held that regional legislators, as well as federal and state legislators, have absolute legislative immunity. "Legislators are immune from deterrents to the uninhibited discharge of their legislative duty, not for their private indulgence but for the public good." *Id.* at 405.

Legislative immunity was "taken as a matter of course by our nation's founders." *Lake Country Estates*, 440 U.S. at 403. It has "its roots in the parliamentary struggle of 16th and 17th century England." *Lake Country Estates*, 440 U.S. at 403. Legislative freedom of speech in England was "a privilege essential to every free council or legislature." T. May, *The Law, Privileges, Proceedings and Usage of Parliament* 47 (14th ed. 1946). By providing absolute legislative immunity for federal, state and regional legislators, this Court, consistent with English common law and history, has found legislative freedom to be of vital importance in enhancing the integrity of the legislative process, insuring legislative independence, thereby protecting the "public good." The "public good" is the securing of representative government and does not warrant the court's assessment of the wisdom of legislative acts in particular cases. *Lake Country Estates*, 440 U.S. at 404-05. Such reasoning is valid and no less applicable to

local legislators and requires that Councilman Chema be accorded absolute legislative immunity.

This Court applies a functional test to determine whether the legislative immunity doctrine is applicable in a particular case. *Forrester v. White*, 484 U.S. 219, 108 S. Ct. 538 (1988). "[I]mmunity is justified and defined by the functions it protects and serves. . . ." *Id.*, 484 U.S. at ___, 108 S. Ct. at 544. Here, Councilman Chema acted within the "sphere of legitimate legislative activity," *Tenney v. Brandhove*, 341 U.S. 367, 376, *reh'g denied*, 342 U.S. 843 (1951), in voting on the zoning ordinance. The power to enact a zoning ordinance is a legislative function delegated to local legislative bodies by the New York State Legislature, and in voting on the Ordinance, Councilman Chema was exercising state legislative power. *Kamhi v. Planning Board of Town of Yorkton*, 59 N.Y.2d 386, 389, 465 N.Y.S.2d 865, 866, 452 N.E.2d 1193, 1194 (1983).

III. The District Court violated Councilman Chema's right to free speech by ordering him how to vote and how not to vote. His vote in the legislature was speech protected by the First Amendment because it was a voice vote and, therefore, speech, as well as expressive conduct, *see, e.g., Spence v. Washington*, 418 U.S. 405 (1974); *Tinker v. Des Moines Indep. Community School Dist.*, 393 U.S. 503 (1969), and the message conveyed was core political speech. The District Court's order of July 26, 1988 violated his right to speak freely because it constituted both compelled speech and a prior restraint: it forced him to vote "yes" on the Ordinance, and prohibited him from voting "no". Compelled speech is prohibited by the First Amendment. *West Virginia State Bd. of Ed. v. Barnette*, 319 U.S. 624, 736 (1942). Prior restraints on speech are the most serious and least tolerable infringements of First Amendment rights. *Nebraska Press Assoc. v. Stuart*, 427 U.S. 539, 559 (1976). There was no justification for this curtailment of Councilman Chema's rights.

IV. Councilman Chema was not bound by the Consent Decree because he was neither a party nor a privy to

it. *Local Number 93, International Assoc. of Firefighters v. City of Cleveland*, 478 U.S. 501, 521-530 (1988). He was not a party because he unequivocally established that he did not consent to it by voting against it. Councilman Chema was not a privy because the Council did not adequately represent his individual rights and interests, and because he was entitled to assert his own First Amendment rights, *see McKinney v. Alabama*, 424 U.S. 669, 675 (1976); *Litchfield v. Crane*, 123 U.S. 549, 550-51 (1887), and to be cloaked with the immunity of his office.

Moreover, the "Consent" Decree was not consensual since it was not voluntary: the Court of Appeals found that ". . . Yonkers entered into the Consent Decree . . . only after being threatened by the District Court with sanctions for contempt." *Yonkers Racing Corp. v. City of Yonkers*, 858 F.2d 855, 865 (2d Cir. 1988), *cert. denied*, 57 U.S.L.W. 3619 (Mar. 20, 1989).

Even if the Decree were consensual as to the Council majority, it could not deprive Councilman Chema of his right to vote his conscience in the future because a temporary legislative majority cannot force individual minority legislators how to vote. *United States Trust Co. v. New Jersey*, 431 U.S. 1, 17 (1977), *reh'g denied*, 431 U.S. 975 (1978). One group of legislators cannot abridge the individual rights and powers of other legislators. *Fletcher v. Peck*, 6 Cranch 87, 135 (1810) (Marshall, J.).

The Court of Appeals' suggestion that Councilman Chema was not compelled by the July 26, 1988 order to vote in a certain way because he was "free" to resign is patently erroneous. A legislator cannot be coerced into choosing between giving up his constitutional rights or resigning. *Uniformed Sanitation Men Assoc. v. Commissioner of Sanitation of the City of New York*, 392 U.S. 280 (1968).

V. Even if the District Court could order Councilman Chema to comply with the Consent Decree, the District Court's July 26, 1988 order did not do so. The order went beyond the terms of the Consent Decree by depriving the Council of its discretion to consider the

impact of zoning changes on the surrounding community, even though the Consent Decree had explicitly reserved this authority in the Council.

ARGUMENT

I. THE DISTRICT COURT DID NOT UTILIZE THE LEAST INTRUSIVE MEANS.

A. Remedial Measures Should Be No Broader Than Necessary To Correct A Constitutional Violation.

As the Court of Appeals correctly recognized, a court is obliged to use the " 'least possible power adequate to the end proposed' " to effect its orders, including the selection of contempt sanctions. 856 F.2d at 454, *citing Shillitani v. United States*, 384 U.S. 364, 371 (1966) [*quoting Anderson v. Dunn*, 19 U.S. (6 Wheat.) 61, 69 (1821)]. Even when protecting the Fourteenth Amendment rights of one party, the Court must be punctilious in safeguarding the constitutional rights of the other parties. To achieve the mandatory balancing of rights, remedial measures should be no broader than necessary to correct the constitutional violation. *Milliken v. Bradley*, 433 U.S. 267, 280 (1977); *Swann v. Charlotte-Mecklenburg Bd. of Ed.*, 402 U.S. 1 (1971).

In *Rizzo v. Goode*, 423 U.S. 362, 380 (1976), this Court wrote, "The principles of federalism which play such an important part in governing the relationship between federal courts and state governments [apply] where injunctive relief is sought against those in charge of an executive branch of an agency of state government." *A fortiori*, the same principles apply with respect to injunctive relief directed at a local legislative body or its members.

Several circuits have applied this principle in the context of cases implicating constitutional rights and the remedies for violation of those rights. In *Ruiz v. Estelle*, 679 F.2d 1115 (5th Cir.), *amended on other grounds*, 688 F.2d

266 (5th Cir. 1982), *cert. denied*, 460 U.S. 1042 (1983), the court, in commenting on its framework for mandating remedial measures, stated, "We should fashion the *least intrusive* remedy that will still be effective." 679 F.2d at 1126 (emphasis added). In *Toussaint v. McCarthy*, 801 F.2d 1080 (9th Cir. 1986), *cert. denied*, 481 U.S. 1096 (1987), the Ninth Circuit ruled that a court "must not require more of state officials than is necessary to assure their compliance with the Constitution." 801 F.2d at 1089. *See also Gary H. v. Bradley*, 831 F.2d 1430, 1432 (9th Cir. 1987); *Newman v. Alabama*, 683 F.2d 1312, 1320 (5th Cir. 1982), *cert. denied*, 460 U.S. 1083 (1983). Finally, a court should avoid "needless confrontation" between the federal judicial power and state or local governments. *Welsch v. Likins*, 550 F.2d 1122, 1132 (8th Cir. 1977).

These words evince two salutary constitutional principles: a constructive restraint on the part of the federal judiciary in confronting, when avoidable, the rights of state and local governmental units, and the sound goal of avoiding conflict between competing constitutional rights or privileges.

Our system of government has not adopted the totalitarian principle that "the end justifies the means – all means." Arthur Koestler, *Darkness At Noon*, 237 (MacMillan 1941 ed.). *See also Casey v. United States*, 276 U.S. 413, 423 (1928) (Brandeis, J., dissenting) ("a desirable end cannot justify foul means"). Rather, in the constitutional framework, the means are often the end; even where that is not so, there is a vital interplay between means and ends. "[T]he impairment of individual liberties cannot be the means of making a point," *National Treasury Employees Union v. Von Raab*, ___ U.S. ___, 109 S. Ct. 1384, ___ (1989) (Scalia, J., dissenting), even if the point is to remedy a constitutional violation. *See Skinner v. Railway Executives' Assoc.*, ___ U.S. ___, 109 S. Ct. 1402, ___ (1989) (Marshall, J., dissenting) ("When we allow fundamental freedoms to be sacrificed in the name of real or perceived exigency, we invariably come to regret it").

B. The District Court Used Unnecessarily Intrusive Means To Compel Compliance With Its Remedial Orders.

The District Court's July 26, 1988 order, requiring that the councilmen vote in favor of the judge's "legislative package," was unnecessarily intrusive. Indeed, it was the *most* intrusive alternative as to Councilman Chema's rights because, as the Court of Appeals itself suggested, it gave Councilman Chema no alternative but either to vote contrary to his conscience, to resign or to be in contempt. By ordering Councilman Chema how to vote, the District Court unnecessarily deprived him of his First Amendment rights and his rights as an elected legislator (and those of his constituents to unfettered political representation), thus setting the stage for a needless constitutional confrontation.

The desirable end of "getting housing built" could have been accomplished by other means which would not have intruded upon Councilman Chema's constitutional rights and legislative immunities. Two such alternative methods had been recognized, but eschewed, by the District Court in this case: establishment of a "fair housing commission" to carry out the long term housing order, and superseding Yonkers' existing zoning law. Appendix p. 105. There is precedent for use of both mechanisms. Advisory panels or special masters appointed for the purpose of carrying out remedies in Fourteenth Amendment cases are not unusual. In *Morgan v. Kerrigan*, 401 F. Supp. 216 (D. Mass. 1973), *aff'd*, 530 F.2d 401 (1st Cir.), *cert. denied sub nom. White v. Morgan*, 426 U.S. 935 (1976), an advisory panel was utilized. In *New York State Assoc. for Retarded Children v. Carey*, 631 F.2d 162 (2d Cir. 1980) and in *Wyatt v. Anderholt*, 503 F.2d 1305 (5th Cir. 1974), a special master was appointed to supervise compliance. Action by the court circumventing a legislative or regulatory body, accompanied by orders to state or local administrative personnel to implement such orders, while less common, is not without precedent. *See, e.g., Washington v.*

Washington State Commercial Fishing Vessel Assoc., 443 U.S. 658, 695, *modified on other grounds*, 444 U.S. 816 (1979); *Karcher v. Daggett*, 580 F. Supp. 1259 (D.N.J.) (3-judge court), *aff'd*, 466 U.S. 910 (1984). Indeed, at earlier stages of this case, the District Court had "deemed" the Housing Assistance Plan to have been adopted, resulting in the release of almost $20 million of federal funds to the City, Appendix p. 174, and, in affirming the Housing Remedy Order, the Court of Appeals held that it was appropriate for the District Court ". . . to deem the City . . ." to have acted in the event that it had failed to do so. 837 F.2d at 1237.

The City took the position below, in fact, that either a commission or court-sponsored changes in Yonkers' zoning ordinance would certainly be far less intrusive than a compelled legislative act. Either would have been less intrusive on Councilman Chema's rights.

The conflict between the governmental interest and Councilman Chema's individual rights in this case is not between the court's interest in having lawful orders or judgments implemented and the Fourteenth Amendment rights of the plaintiff class vindicated (both of which are legitimate ends) on the one hand, and Councilman Chema's rights on the other, but between the *means* used by the District Court of compelling a legislative act, which is speech, and the use of the contempt power to coerce that act, as compared with Councilman Chema's First Amendment rights and legislative immunity privilege. The speech in this case is "core political speech," and the burden on the government to justify its limitation is "well-nigh insurmountable." *Meyer v. Grant*, ___ U.S. ___, 108 S. Ct. 1886, 1894 (1988). The abolition of Councilman Chema's right to speak in this case was neither the necessary nor the appropriate remedy.

The District Court need not have infringed Councilman Chema's First Amendment rights in order to implement the long term housing plan. Rather, the District Court could have used, and thus was required to use, those other means it had at its disposal which are far less intrusive upon Councilman Chema's individual rights

than a dictated vote backed up by the contempt power to achieve the remedial goal of the affordable housing plan.

Contempt was the most drastic, yet a wholly unnecessary, measure available to the District Court to effect the housing remedy. A commission with a proper mandate, court-directed exemption or variance from existing zoning, or court-directed housing without regard to zoning, could have produced the desired housing without exacting retribution from Councilman Chema or the City.

Contempt, as the first rather than the last resort, foreclosed consideration of rational approaches to the problem of avoiding senseless constitutional confrontation. The District Court chartered a deliberate course calculated to be the "most expensive" route, Appendix p. 178, for the City, its elected officials and their constituents in both economic and social terms. Other options were considered only in a most abstract, passing way. In the context of this case, the contempt power was abused because it was the exercise of the greatest power possible in the way least likely to produce the end desired, i.e., housing that benefits the entire community, and most likely to infringe on individual rights.

II. COUNCILMAN CHEMA IS ENTITLED TO ABSOLUTE LEGISLATIVE IMMUNITY FOR HIS LEGISLATIVE VOTE.

The District Court's "extraordinary" July 26, 1988 order, Appendix p. 433, directing Councilman Chema to vote and how to vote, and its order of August 2, 1988 holding Councilman Chema in civil contempt for casting a legislative vote in the City Council, are invalid because taken together they violate his absolute legislative immunity.[6]

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[6] Councilman Chema contests the District Court's authority to enter the Order of July 26, 1988. He filed a timely notice

(Continued on following page)

A. The Doctrine Of Legislative Immunity And Its History.

It has long been established that federal and state legislators have absolute legislative immunity. *Kilbourn v. Thompson*, 103 U.S. 168 (1881); *Tenney v. Brandhove*, 341 U.S. 367, *reh'g denied*, 342 U.S. 843 (1951). Justice Frankfurter stated in *Tenney v. Brandhove*, 341 U.S. at 377:

> Legislators are immune from deterrents to the uninhibited discharge of their legislative duty, not for their private indulgence but for the public good. One must not expect uncommon courage even in legislators. The privilege would be of little value if they could be subjected to the cost and inconvenience and distractions of a trial upon a conclusion of the pleader, or to the hazard of a judgment against them based upon a jury's speculation as to motives. The holding of this Court in *Fletcher v. Peck*, 6 Cranch 87, 130, [3 L Ed 162], that it was not consonant with our scheme of government for a court to inquire into the motives of legislators, has remained unquestioned.

In *Lake Country Estates v. Tahoe Planning Agency*, 440 U.S. at 405-06, this Court held that regional legislators

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(Continued from previous page)

of appeal of the July 26th order, Appendix p. 501, and challenged its validity in the Court of Appeals. Court of Appeals Brief of Peter Chema, p. 2. He was the only councilman to have done so. His right to challenge the underlying order is clear, see *United States Catholic Conference v. Abortion Rights Mobilization, Inc.*, ___ U.S. ___, 108 S. Ct. 2268 (1988); *United States v. Thompson*, 319 F.2d 665, 668 (2d Cir. 1963); *United States v. Baird*, 241 F.2d 170, 172 (2d Cir. 1957). It was entirely appropriate for Councilman Chema, as a matter of "conscience," to test the validity of the July 26th order by submitting to the civil contempt sanction, especially where, as here, he raises an issue of the "excessive use of judicial power." *See United States Catholic Conference v. Abortion Rights Mobilization Inc.*, 108 S. Ct. at 2271.

have absolute legislative immunity in adopting a land use ordinance and general plan.

The immunity of legislators has "its roots in the parliamentary struggle of 16th and 17th century England." *Lake Country Estates*, 440 U.S. at 403. The English Parliament attached central importance to legislative freedom of action and expression. The English Bill of Rights of 1688 declared "that the freedom of speech and debates or proceedings in Parliament ought not to be impeached or questioned in any Court or place out of Parliament." 1 Wm. & Mary, Sess. 2, c.2, *cited in* 1 W. Anson, *The Law And Custom Of The Constitution* 160a (rev. 4th ed. 1911). The "[p]rivilege of parliament was principally established in order to protect its members not only from being molested by their fellow-subjects, but also more especially from being oppressed by the power of the crown." 1 W. Blackstone, *Commentaries* 164 (7th ed. 1775). The privilege of free speech and debate in Parliament "enabled it to act freely, to carry on the controversy with the king in a Parliamentary way, and thus to secure a continuous development of constitutional principles." 6 W. Holdsworth, *A History of English Law* 92 (1924). "The privilege of freedom of speech enabled . . . [Parliament] to criticize the conduct of the government and of its agents, and to suggest changes and reforms." *Id.* at 100. Thus, freedom of speech in England was historically "a privilege essential to *every* free council or legislature." T. May, *The Law, Privileges, Proceedings and Usage of Parliament* 47 (14th ed. 1946) (emphasis added).

Legislative immunity was "taken as a matter of course by our Nation's founders." *Lake Country Estates*, 440 U.S. at 403. James Wilson, a member of the Committee of Detail which drafted the Speech and Debate Clause of the United States Constitution, stated:

> In order to enable and encourage a representative of the public to discharge his public trust with fairness and success, it is indispensably

> necessary, that he should enjoy the fullest liberty of speech, and that he should be protected from the resentment of every one, however powerful, to whom the exercise of that liberty may occasion offense.

2 J. Wilson, *The Works of James Wilson* 38 (Andrews ed. 1896).

By recognizing absolute legislative immunity for federal, state and regional legislators, this Court, consistent with the English common law, has held legislative freedom to be of vital importance in preserving the integrity of the legislative process, insuring legislative independence, thereby protecting the "public good." *Lake Country Estates*, 440 U.S. at 404-05.

The Court's reasoning for clothing federal, state and regional legislators with absolute immunity, so firmly entrenched in English common law and history, is equally persuasive and no less applicable to affording such immunity to local legislators. Local legislators are closer to their constituents, act on vital matters of local importance and are more vulnerable to litigation and its deterrent effects to the uninhibited discharge of their legislative duties. The need for Congress or a state or a regional legislative body to act independently and free of interference is neither more nor less than the need for an unimpaired local legislative body. Affording local legislators absolute legislative immunity would ensure effective, independent legislative decision-making, and, thus, inure to the good of the public. Local legislators stand in the same shoes and function no differently than their federal, state and regional counterparts. Indeed, Justice Marshall, in his dissent in *Lake Country Estates*, 440 U.S. at 407-08, recognized:

> [T]he majority's reasoning in this case leaves little room to argue that municipal legislators stand on a different footing than their regional counterparts. Surely the Court's supposition that the "cost and inconvenience and distractions of a trial" will impede officials in the

> " 'uninhibited discharge of their legislative duty,' " *ante*, at 405, 59 L Ed 2d at 412, quoting *Tenney v. Brandhove, supra* at 377, 95 L Ed 1019, 71 S Ct 783, applies with equal force whether the officials occupy local or regional positions.

The doctrine of legislative immunity is at the core of our revered system of representative democracy.

The mere threat of suit "may chill legislators in the performance of their duties." *Star Distributors, Ltd. v. Marino*, 613 F.2d 4, 7 (2d Cir. 1980) (state legislators are immune from suit under 42 U.S.C. § 1983 for injunctive relief based on their activities within the sphere of legislative activity), *citing Gravel v. United States*, 408 U.S. 606, 617-18, *reh'g denied*, 409 U.S. 902 (1972), and *Tenney v. Brandhove*, 341 U.S. at 377. It is as likely to inhibit a city councilman's decision-making as it is to inhibit federal, state or regional legislators. As with those legislators, the "public good" requires that a city councilman's decision-making not be inhibited by fear of being hailed into court to face imprisonment and fines for the exercise of his legislative responsibility. The judgment appealed from in this case deters local legislators from freely exercising their legislative duties and voting their consciences. Further, the argument for absolute immunity for local legislators such as Councilman Chema is even stronger here than in *Lake Country Estates*, because Councilman Chema is an elected, not appointed, official, and is answerable to the electorate, which is possessed of the power to discourage and correct abuses by voting officials out of office. *Tenney v. Brandhove*, 341 U.S. at 378.

The Third, Fourth, Fifth, Seventh, Eighth, Ninth and Eleventh Circuits have extended absolute legislative immunity to local legislators. *See, e.g., Aitchison v. Raffini*, 708 F.2d 96 (3d Cir. 1983) (municipal council members are absolutely immune from damages under 42 U.S.C. § 1983 for wrongful discharge); *Reed v. Village of Shorewood*, 704 F.2d 943 (7th Cir. 1983) (village board of trustees entitled to absolute legislative immunity in reducing number of liquor licenses in village); *Espanola Way Corp. v. Meyerson*, 690 F.2d 827 (11th Cir. 1982), *cert. denied*, 460 U.S. 1039

(1983) (local legislators have absolute immunity for legislative acts); *Kusinich v. Co. of Santa Clara*, 689 F.2d 1355 (9th Cir. 1983) (local legislators are absolutely immune for enactment of zoning ordinance); *Hernandez v. City of Lafayette*, 643 F.2d 1188 (5th Cir. 1981), *reh'g denied*, 649 F.2d 336, *cert. denied*, 455 U.S. 907 (1982) (city mayor entitled to absolute legislative immunity for his veto of two zoning ordinances); *Bruce v. Riddle*, 631 F.2d 272 (4th Cir. 1980) (county council members are absolutely immune from liability for zoning ordinance); *Gorman Towers, Inc. v. Bogoslavsky*, 626 F.2d 607 (8th Cir. 1980) (municipal legislators have absolute immunity from liability for zoning amendment).

No Court of Appeals has denied immunity to local legislators since this Court decided *Lake Country Estates*.

B. Councilman Chema Performed A Legislative Function By His Vote And Is Entitled To Absolute Legislative Immunity.

Councilman Chema is entitled to absolute immunity because he acted in a legislative capacity. This and other courts have long applied a functional test to determine whether absolute immunity is applicable in a particular case. In *Westfall v. Erwin*, 484 U.S. 292, ___ n.3, 108 S. Ct. 580, 583 n.3 (1988), this Court, in an opinion by Justice Marshall, stated:

> In determining the propriety of shielding an official from suit under the circumstances, this Court has long favored a 'functional' inquiry – immunity attaches to particular office functions, not to particular offices.

See also Forrester v. White, 484 U.S. at ___, 108 S. Ct. at 642 . . . ("[W]e examine the nature of the functions with which a particular official . . . has been lawfully entrusted. . . . "); *Supreme Court of Virginia v. Consumers Union*, 446 U.S. 719, 731-34 (1980) (Virginia Supreme Court, in promulgating the State Bar Code, acted in a legislative capacity and had absolute legislative immunity). As stated by this Court in *Forrester*, 484 U.S. at ___, 108 S. Ct. at 544, "immunity is justified and defined by

the functions it protects and serves. . . ." In *Lake Country Estates*, 440 U.S. at 405-06, this Court did not look at the level of government at which the official served, but whether the official acted in a legislative capacity comparable to that of state legislators.

Casting a legislative vote is certainly within the "sphere of legitimate legislative activity." *Tenney v. Brandhove*, 341 U.S. at 376. *See also Kilbourn v. Thompson*, 103 U.S. at 204 (Speech or Debate Clause immunity applies to voting for a resolution). In fact, this Court, in *Tenney*, quoted from *Coffin v. Coffin*, 4 Mass. 1, 27 (1808), as follows:

> These privileges are thus secured . . . to support the rights of the people, by enabling their representatives to execute the functions of their office without fear of prosecutions, civil or criminal. I therefore think that the article ought not to be construed strictly, but liberally, that the full design of it may be answered. I will not confine it to delivering an opinion, uttering a speech, or haranguing in debate; *but will extend it to the giving of a vote.*

Tenney v. Brandhove, 341 U.S. at 373-74 (emphasis added).

The power to enact a zoning ordinance is a legislative function delegated to local legislative bodies by the New York State Legislature. *Kamhi v. Planning Bd. of Town of Yorkton*, 59 N.Y.2d 386, 389, 465 N.Y.S.2d 865, 866, 452 N.E.2d 1193, 1194 (1983). *See also Village of Belle Terre v. Boraas*, 416 U.S. 1, 4 (1974). Thus, Councilman Chema's vote was truly legislative and constituted an exercise of state legislative power. Therefore, he was entitled to absolute immunity.

The independent performance of the legislative function is ensured by affording Councilman Chema legislative immunity for his debate and vote, as dictated by his conscience, on the political, economic and social issues affecting his constituency. No federal court has the power to direct Councilman Chema to vote, to cast his vote in a particular way, or to sanction him for voting as he saw fit.

C. The Cases Relied Upon By The Court Of Appeals Are Distinguishable.

The cases relied upon by the Court of Appeals, *Bush v. Orleans Parish School Bd.*, 188 F. Supp. 916 (E.D. La. 1960), *aff'd*, 365 U.S. 569 (1961) ("Bush I"), *Bush v. Orleans Parish School Bd.*, 191 F. Supp. 871 (E.D. La.), *aff'd sub nom., Denny v. Bush*, 367 U.S. 908 (1961) ("Bush II"), *Milliken v. Bradley*, 433 U.S. 267 (1977), and *Griffin v. Co. School Bd.*, 377 U.S. 218 (1964), do not support a contrary result. In *Bush I* and *Bush II, supra*, the court did not, as here, compel the legislators to enact any legislation. The court there did not dictate to any particular legislator how to vote on proposed legislation. In the original action, *Bush I*, the court found that the Louisiana legislature had acted in an administrative, not legislative, capacity in administering the New Orleans public schools and was, therefore, not entitled to legislative immunity. As the court stated:

> There is no effort to restrain the Louisiana Legislature as a whole, or any individual legislator, in the performance of a *legislative* function. It is only insofar as the lawmakers purport to act as *administrators* of the local schools that they, as well as all others concerned, are sought to be restrained from implementing measures which are alleged to violate the Constitution. Having found a statute unconstitutional, it is elementary that a court has power to enjoin all those charged with its execution. Normally, these are officers of the executive branch, but when the legislature itself seeks to act as executor of its own laws, then, quite obviously, it is no longer legislating and is no more immune from process than the administrative officials it supersedes. As Chief Justice Marshall said in *Marbury v. Madison*, 1 Cranch 137, 170, 5 U.S. 137, 170, 2 L.Ed. 60: "It is not by the office of the person to whom the writ is directed, but the nature of the

> thing to be done, that the propriety or impropriety of issuing [an injunction] is to be determined." (emphasis in original).

Bush I, 188 F. Supp. at 922.

Milliken did not involve legislative immunity but, as the Court of Appeals recognized, dealt with sovereign immunity. 856 F.2d at 456. *Milliken* supports Councilman Chema's position because it stands for the proposition that remedial measures should be no broader than necessary to correct a constitutional violation. In *Milliken*, the Court stated that "to ensure that federal court decrees are characterized by the flexibility and sensitivity required of equitable decrees, consideration must be given to burdensome effects," and that "[t]here are undoubted practical as well as legal limits to the remedial powers of federal courts. . . ." 433 U.S. at 280, n.15.

Finally, the portion of the opinion in *Griffin* relied upon by the Court of Appeals is pure dictum. There is no discussion in *Griffin* of the question of legislative immunity because the issue was not before the Court.

Legislative immunity precludes a court-compelled legislative vote and the imposition of civil contempt sanctions against Councilman Chema.

III. THE JULY 26, 1988 ORDER AND THE CONTEMPT JUDGMENT VIOLATED COUNCILMAN CHEMA'S FIRST AMENDMENT RIGHTS.

A vote, particularly a voice vote in open public session by an elected legislator, is speech protected by the First Amendment, "a major purpose [of which is] . . . to protect the free discussion of governmental affairs." *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 604 (1982), *citing, Mills v. Alabama*, 384 U.S. 214, 218 (1966). The District Court's orders violated Councilman Chema's right of free speech because they constituted both compelled speech and a prior restraint. Consequently, the

July 26, 1988 order and the contempt judgment are invalid.

A. The First Amendment Protects Councilman Chema's Right To Speak Freely In The Legislature By Voting.

It is well-settled that conduct, if sufficiently expressive, will be protected as free speech under the First Amendment. *See, e.g., Spence v. Washington,* 418 U.S. 405 (1974) (displaying the flag with a peace symbol attached is protected); *Tinker v. Des Moines Indep. Community School Dist.,* 393 U.S. 503 (1969) (wearing armbands is protected speech); *Wooley v. Maynard,* 430 U.S. 705 (1977) (state's motto on license plate is speech, and right *not* to display motto and thus not to speak is protected).

"Core political speech" involves communication concerning political change. *See Meyer v. Grant,* ___ U.S. ___, 108 S. Ct. 1886, 1891-92 (1988). Councilman Chema's vote concerned an important public issue, and the message he conveyed by his vote was therefore "core political speech." The First Amendment "affords the broadest protection to such political expression in order to 'assure [the] unfettered interchange of ideas for the bringing about of political and social changes. . . .'" *Buckley v. Valeo,* 424 U.S. 1, 14 (1976), *quoting Roth v. United States,* 354 U.S. 476, 484 (1957). As this Court pointed out in *Bond v. Floyd,* 385 U.S. 116 (1966), the First Amendment protects the most important function of legislators – the ability to discuss their views freely:

> [The government has] no interest in limiting . . . legislators' capacity to discuss their views of local or national policy. The manifest function of the First Amendment in a representative government requires that legislators be given the widest latitude to express their views on issues of policy.

Id., at 135-36 (footnote omitted).

This "latitude" must include the right to vote freely. Without protection to vote as their consciences dictate, legislators would be unable to fulfill their duty to their constituents. Curtailment of a legislator's right to vote as he wishes interferes with the protected relationship between a legislator and his constituents, and deprives not only the legislator, but also the electorate, of the fundamental constitutional right to vote. *See Tashjian v. Republican Party of Connecticut*, 479 U.S. 208 (1986); *Democratic Party of the United States v. Wisconsin ex rel. La Follette*, 450 U.S. 107 (1981); *Powell v. McCormack*, 395 U.S. 486, 527 (1969); *Reynolds v. Sims*, 377 U.S. 533 (1964).

As Jefferson and Madison wrote 190 years ago:

> . . . for the Judiciary to interpose in the legislative department between the constituent and his representative, to control them in the exercise of their functions or duties toward each other . . . is to put the legislative department under the feet of the Judiciary, is to leave us, indeed, the shadow, but to take away the substance of representation, which requires essentially that the representative be as free as his constituents would be, that the same interchange of sentiment be lawful between him and them as would be lawful among themselves were they in the personal transaction of their own business . . .

T. Jefferson and J. Madison, *Protest to the Virginia House of Delegates* (1797) in THE WORKS OF THOMAS JEFFERSON, 322-23, 325-27 (P. Ford ed. 1904).

A legislator does not lose his First Amendment rights when he enters office. He is not stripped of his fundamental right of free speech when he engages in his legislative activities. "Plaintiff's status as a legislator does not strip [him] of any rights [he] would otherwise enjoy under the First Amendment to speak freely or to speak not at all." *Wrzeski v. City of Madison*, 558 F. Supp. 664, 667

(W.D. Wis. 1988).[7] Indeed, as shown above, the position of a legislator as a spokesman for the electorate, as well as for himself, enhances the already compelling rationale for the constitutional protection of legislative free speech.

B. The District Court's Orders Constituted Compelled Speech.

The July 26, 1988 order which required Councilman Chema to vote for specific legislation constituted compelled speech, which this Court has long held to be violative of First Amendment rights. In *West Virginia State Bd. of Ed. v. Barnette*, 319 U.S. 624, 637 (1942) (refusal to stand and participate in pledge of allegiance is protected speech), the Court held that the right to speak and the right to refrain from speaking are complementary components of the broader concept of individual freedom of mind, and that compelled speech is as much prohibited by the First Amendment as are attempts to prevent or inhibit speech. *See also Wooley v. Maynard*, 430 U.S. at 714 (obliterating patriotic motto on license plate is protected symbolic speech).

The District Court could not compel Councilman Chema how to vote, even if it could enforce the Consent Decree against the City. The Court of Appeals' holding that, notwithstanding the direction to vote "yes", the "council members remain free to express their views on all aspects of housing in Yonkers," 856 F.2d at 444, is constitutionally unacceptable. *See, e.g., Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241 (1974); *Pacific Gas &*

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[7] The action challenged in *Wrzeski* was a city ordinance that purported to compel city council members to vote "yes" or "no" on proposed legislation, and to prohibit them from abstaining. The District Court's July 26 order was still more repugnant because it purported to compel Councilman Chema to vote "yes" contrary to his best judgment. In *Wrzeski*, the legislators' right of expression was curtailed, but not eliminated, because they could vote for, or against, legislation.

Electric Co. v. Public Utilities Commission, 475 U.S. 1 (1986); *Riley v. National Federation of the Blind*, ___ U.S. ___, 108 S. Ct. 2667 (1988). Officially imposed hypocrisy cannot be sanctioned by this Court; the very notion is unworthy of the heirs of Hamilton, Madison and Jefferson. The ambiguous message a "yes" vote and contrary words conveys would give rise to the belief that Councilman Chema had failed to act on his beliefs and convictions, and had changed his theretofore consistent view. *See Clarke v. United States*, 705 F. Supp. 605, ___, No. 88-3190, slip op. at 7 (D.D.C. Dec. 13, 1988). Moreover, the Court of Appeals' statement is so self-evident and so broadly applicable as to be meaningless. In every compelled speech case the unwilling speaker can disavow the statements he is forced to make or actions he is forced to take. This "right" has never been found by this Court to be a satisfactory safeguard of rights of free speech, and it does not sanitize the District Court's violation of Councilman Chema's First Amendment rights, any more than would legislative infringement of free speech.

C. The District Court's Orders Constituted A Prior Restraint.

The District Court's July 26, 1988 order is especially repugnant to the Constitution because it is an unconstitutional prior restraint: it directs Councilman Chema to vote "yes" with respect to the legislation and it restrains him, in advance of the vote, from voting "no," under pain of civil contempt. Indeed, the Government argued that the July 26, 1988 order should be used as a means to silence the councilmen who disagreed with the Ordinance. Appendix p. 393.

Judicial prior restraints on speech are the most serious and least tolerable infringements of First Amendment rights. *Nebraska Press Assoc. v. Stuart*, 427 U.S. 539, 559 (1976). If the threat of subsequent sanctions "chills" speech, *Id.* at 559, then a prior restraint "freezes" it. The main purpose of the First Amendment is "to prevent all

such previous restraints . . . as had been practiced by other governments." *Patterson v. Colorado*, 205 U.S. 454, 462 (1907). *See also Schenk v. United States*, 249 U.S. 47, 51 (1918) (Holmes, J.).

Because prior restraints are so dangerous, the party defending such a restraint has the "heavy burden" of overcoming "a strong presumption against its constitutional validity." *Nebraska Press Assoc.*, 427 U.S. at 415; *New York Times Co. v. United States*, 403 U.S. 713, 714 (1971). Accordingly, "there is a single, extremely narrow class of cases in which the First Amendment's ban on prior judicial restraint may be overridden . . . such cases may arise only when the Nation is at war," and the speech poses an immediate threat to American lives. *New York Times Co.*, 403 U.S. at 726-27 (Brennan, J., concurring). Here, the circumstances of Councilman Chema's vote do not approach the very high threshold of national security interests and imminent threat to lives to which the narrow exception to the rule against prior restraints may apply. The Government, the NAACP and the District Court have failed to overcome the strong presumption of the prior restraint's invalidity.

D. The Government Has Failed To Prove That The Restrictions On Councilman Chema's First Amendment Rights Were Justified.

Government restrictions on the rights to speak and vote can survive only where, unlike here, the Government proves that the restrictions are justified by an overriding compelling interest and that less restrictive means to protect that interest are not available. *Illinois State Bd. of Elections v. Socialist Workers Party*, 440 U.S. 173, 185 (1979); *First National Bank of Boston v. Bellotti*, 435 U.S. 765, 786, *reh'g denied*, 438 U.S. 970 (1978).

Because the speech involved in this case is "core political speech," the burden on the Government to justify its limitation or, in this case, abolition, is "well-nigh insurmountable." *Meyer v. Grant*, ___ U.S. ___, 108 S. Ct.

1886, 1894 (1988) (statute which made it a felony to pay petition circulators was unconstitutional). As shown above, the District Court need not have infringed Councilman Chema's First Amendment rights in order to implement the Consent Decree and the Long Term Plan Order. Rather, the District Court had at its disposal means far less intrusive upon Councilman Chema's individual rights than a dictated vote backed up by the contempt power and its threatened deprivation of his liberty and property. The District Court's restrictions on Councilman Chema's rights to speak and vote freely were unjustified.

IV. THE CONSENT DECREE DID NOT BIND COUNCILMAN CHEMA BECAUSE HE DID NOT CONSENT TO IT.

A. Councilman Chema Was Neither a Party Nor A Privy To The Decree.

The Court of Appeals' erroneous holding that Councilman Chema is bound by the January 28, 1988 Consent Decree reverses the principle established by this Court that only a party who had freely consented to a consent decree is obligated by it. *Local Number 93, International Assoc. of Firefighters v. City of Cleveland*, 478 U.S. 501, 521-22, 530 (1986) ("only parties to the decree can be held in contempt for failure to comply with its terms"). *See also Kneeland v. Luce*, 141 U.S. 437, 440-41 (1891) (a stipulation binds only the parties to it). There is no dispute that Councilman Chema voted against the Decree when the Council was asked to approve it in January 1988. Appendix p. 439. There was no consent, no agreement, no meeting of the minds, and no commitment by Councilman Chema to vote for implementing legislation.

Councilman Chema was not a privy to the Consent Decree. A non-party is a privy only if his rights and interests were adequately represented by a party. *McKinney v. Alabama*, 424 U.S. 669, 675 (1976); *Amalgamated Sugar Co. v. NL Industries, Inc.*, 825 F.2d 634, 640 (2d Cir.), *cert. denied*, ___ U.S. ___, 108 S. Ct. 511 (1987); *Freeman v.*

Lester Coggins Trucking, Inc., 771 F.2d 860, 864 (5th Cir. 1985); *Southwest Airlines Co. v. Texas International Airlines, Inc.*, 546 F.2d 84, 95 (5th Cir.), *reh'g denied*, 550 F.2d 42 (5th Cir.), *cert. denied*, 434 U.S. 832 (1977). A party adequately represents the interests of a non-party only if their rights and interests are "identical;" similar or parallel rights and interests are insufficient. *Sea-Land Services v. Gaudet*, 414 U.S. 573, 593-94 (1974), *reh'g denied*, 415 U.S. 986 (1974); *Litchfield v. Crane*, 123 U.S. 549, 550-51 (1887); *Freeman v. Lester Coggins Trucking, Inc.*, 771 F.2d at 864.

A government officer can bind his government agency and its other officers only in matters within the agency's official authority; he cannot bind the other officers in their personal capacities. *Sunshine Anthracite Coal Co. v. Adkins*, 310 U.S. 381, 402-03 (1939); *Sage v. United States*, 250 U.S. 33, 37 (1919) (The United States and the Commissioner of Internal Revenue are not privy to a judgment against a tax collector because the suit against the collector is "personal and its incidents, such as the nature of the defenses . . . are different"). A government is not in privity with its citizens when it infringes individual rights of the citizenry guaranteed by the Constitution. *See Town of Lockport v. Citizens for Community Action*, 430 U.S. 259, 263 n.7 (1977) (Individual voters were not in privity with their county government where it sought to enforce laws which the voters later claimed violated personal constitutional rights arising from the equal protection clause of the Fourteenth Amendment).

Here, Councilman Chema was not a privy of the Council or the other councilmen because they did not represent his interests as an individual and as an elected representative to speak and to vote freely and to represent Yonkers' Second District. The Council, as an organ of the City government, was concerned with the official interests and obligations of the City when it entered into the Consent Decree; it was not concerned with Councilman Chema's personal First Amendment rights. Even if the councilmen who voted in favor of the Decree had an

interest in protecting their own First Amendment rights, they could not divest Councilman Chema of *his* First Amendment rights because each councilman is entitled to value his rights differently and to make his own determination of whether and how vigorously to assert them. *See McKinney v. Alabama*, 424 U.S. at 675-76 (finding in one action that a magazine is obscene did not conclusively establish the issue of the magazine's obscenity in a subsequent action involving different defendants, because each defendant must be given the opportunity to assess for himself the value and strength of his First Amendment claims). The collective vote of the Council, or the vote of any other councilman, could not strip Councilman Chema of the immunity derived from his office and its legislative function exercised in representing Yonkers' Second District.

B. The Decree Was Not Consensual.

The Council entered into the Consent Decree only after the District Court threatened it with contempt sanctions. A consent decree is, by definition, a decree entered by consent of the parties. *United States v. Armour & Co.*, 402 U.S. 673, 681 (1971); *Black's Law Dictionary*, 370 (5th ed. 1979). A court cannot order litigants to settle a case by entering into a consent decree, because such a decree would not be voluntary. "[T]he voluntary nature of a consent decree is its most fundamental characteristic." *Local Number 93, International Assoc. of Firefighters*, 478 U.S. at 522. It is the parties' agreement that serves as the source of the court's authority to enter a consent judgment. *United States v. Ward Baking Co.*, 376 U.S. 327 (1964).

Here, the Consent Decree was not voluntary. The Court of Appeals, only four weeks after the decision appealed from, found in a related case that the Consent Decree was entered into only under threat of contempt. ". . . Yonkers entered into the Consent Decree . . . only after being threatened by the District Court with sanctions for contempt." *Yonkers Racing Corp. v. City of*

Yonkers, 858 F.2d 855, 865 (2d Cir. 1988), *cert. denied*, 57 U.S.L.W. 3619 (Mar. 20, 1989).[8]

The Court of Appeals' finding that Yonkers entered into the Consent Decree only after the District Court had threatened contempt sanctions is well-supported by the record. On January 19, 1988, the District Court threatened the City with bankrupting fines if it did not comply with the housing remedy order:

> Yonkers will comply with the housing remedy order [of July 1, 1987, requiring the city to adopt a housing assistance plan, Appendix p. 150] or it will be in contempt, it will be in bankruptcy . . . Yonkers is in a state of crisis. It is tottering on the brink of having its elected officials replaced by appointed officials . . . I direct that no elected representatives of the City of Yonkers remove himself from the jurisdiction of this Court pending a resolution of this issue.

Appendix pp. 176, 182-83. The District Court also threatened that the housing "will go forward under the most expensive, the most divisive, conditions possible." Appendix p. 178.

So intent was the District Court on imposing its will on the councilmen that it threatened to deprive them of their rights. The District Court explicitly threatened to remove the councilmen from office, a power that the District Court did not possess.

> To give federal judges such authority seems not only completely out of place in our federal form of government but it at least comes perilously close to violating the constitutional obligation of the Federal Government to guarantee to every State a republican form of government. Subjecting a state official's tenure of office to the

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[8] The respondents must accept this finding of the Court of Appeals because it is a finding of fact, and it is not erroneous. Fed. R. Civ. P. 52(a); *Anderson v. Bessemer City*, 470 U.S. 564, 573, 580-81 (1985).

> discretion of the federal judiciary makes state officers not responsible to the people of the State, but instead to federal judges. . .

Lance v. Plummer, 384 U.S. 929 (1966) (Black, J., dissenting) (Justice Black would grant petition for writ of certiorari to review district court's exercise of the contempt power by directing state official to resign from office). *See also* U.S. Const. Art. IV, § 4; *Highland Farms Dairy v. Agnew*, 300 U.S. 608 (1936).

The District Court also deprived them, without any process, of the right to travel outside of the judicial district. *See Jones v. Helms*, 452 U.S. 412, 418-419 (1981) (right to travel is a "fundamental" right protected by the Due Process Clause of the Fifth Amendment); *Califano v. Gautier Torres, Puerto Rico*, 435 U.S. 1, 4 n.6 (1978) ("The constitutional right of interstate travel is virtually unqualified"); *United States v. Albardo*, 495 F.2d 799, 807 (2d Cir. 1974) (conditioning right to air travel upon submission to a frisk by a magnetometer is a form of coercion); *United States v. Kroll*, 481 F.2d 884, 886 (8th Cir. 1973) (compelling a person to choose between exercising his Fourth Amendment right and his right to travel constitutes coercion).

Faced with the threat to the City of ruinous bankruptcy and actual restrictions of their personal liberty, a majority of the councilmen capitulated to the District Court's demands and voted for the Consent Decree on January 28, 1988. Under these circumstances, the Consent Decree was not voluntarily adopted because it was the product of the threat of contempt and limitations on the right to travel. *See Minnesota v. Murphy*, 465 U.S. 420, 443, *reh'g denied*, 466 U.S. 945 (1984) (a person is deprived of free choice if he is threatened with a substantial sanction if he refuses to respond) (Marshall J., dissenting).

C. Councilman Chema Voted Against The Decree.

The Court of Appeals erred in holding that Councilman Chema was bound by the Decree, even though he

had voted *against* it. In so holding, the Court of Appeals cited no authority, 856 F.2d at 457, and indeed could not cite any authority. The court's holding is premised upon the untenable proposition that a legislative majority can bind the minority to vote a certain way in perpetuity by the simple expedient of passing legislation purporting to compel the entire legislature to vote that way in the future, thus stripping each minority legislator of the unfettered right to vote as he chooses.

This novel argument violates a fundamental principle of our representative government. A legislature, by enacting legislation, cannot deprive individual legislators of their right later to vote to change that legislation. *See United States Trust Co. v. New Jersey*, 431 U.S. 1, 17 (1977), *reh'g denied*, 431 U.S. 975 (1978). Legislative bodies may not limit the unfettered discretion of their successors to consider legislation. "[O]ne legislature is competent to repeal any act which a former legislature was competent to pass; and that one legislature cannot abridge the powers of a succeeding legislature." *Fletcher v. Peck*, 6 Cranch 87, 135 (1810) (Marshall, J.). *See also Marin v. Foster*, 45 N.Y.2d 287, 293, 408 N.Y.S.2d 387, 390-91, 380 N.E.2d 217 (1978) ("Elected officials must exercise legislative and governmental powers, within their own sound discretion, as the needs require. Ordinarily they may not so exercise their powers as to limit the same discretionary right of their successors to exercise that power and must transmit that power to their successors unimpaired"); *People ex rel. Devery v. Cooler*, 173 N.Y. 103, 110, 64 N.E. 956 (1903) ("Nothing is better settled in our jurisprudence [than] that one legislature cannot bind the hands or limit the power of subsequent legislatures"); *Freeman v. Lamb*, 33 A.D.2d 331, 333, 308 N.Y.S.2d 580, 582 (4th Dep't 1970) ("a retiring [City] Council may not legislate to limit the power of a successor Council to act"). *See also Wrzeski v. City of Madison*, 558 F. Supp. 664 (W.D. Wis. 1983) (city ordinance requiring city counsel members to vote "yea" or "nay" on every resolution held invalid).

It is self-evident that a legislative majority cannot pass legislation which purports to bind the individual members of the minority to vote in a particular manner.

D. The Resignation "Alternative" Was A Form of Coercion.

The Court of Appeals' suggestion that any councilman who voted against the Consent Decree could avoid its binding effect by resigning his office is contrary to this Court's principle that one cannot be presented with a Hobson's choice of either giving up one's constitutional rights or incurring a crushing penalty. A Hobson's choice is, of course, no choice at all, and is only a thinly veiled form of compulsion. *Uniformed Sanitation Men Assoc. v. Commissioner of Sanitation of the City of New York*, 392 U.S. 280 (1968) (city employees cannot be fired for refusing to waive their right against self-incrimination); *Simmons v. United States*, 390 U.S. 377, 394 (1968) (a defendant need not waive his Fifth Amendment privilege against self-incrimination to invoke his Fourth Amendment right).

Contrary to the Court of Appeals' position, Councilman Chema could not be compelled to choose between surrendering his fundamental constitutional rights to free speech and to vote his conscience, or incurring the "crushing penalty" of giving up the public office to which he was duly elected. *See Bond v. Floyd*, 385 U.S. 116 (1966) (Georgia House of Representatives could not exclude a duly elected representative because he had spoken against the Vietnam War and the draft). Moreover, had Councilman Chema resigned, his constituents would have been deprived of their most basic democratic right to "choose whom they please to govern them." *Powell v. McCormack*, 395 U.S. 486, 547 (1969) (*quoting* 2 Elliot's Debates 257).

The logical but absurd extension of the Court of Appeals' reasoning is that an elected official is free to express his political views anywhere *except* in the legislative chamber to which he was elected, and in any manner *except* the exercise of the legislative power his constituents entrusted to him.

V. THE DISTRICT COURT'S ORDER OF JULY 26, 1988 DIRECTING COUNCILMAN CHEMA TO VOTE IN FAVOR OF THE ORDINANCE WENT BEYOND THE TERMS OF THE CONSENT DECREE.

The District Court's order of July 26, 1988 to vote for the Ordinance was improper, even if the Consent Decree did bind Councilman Chema, because the order impermissibly changed the terms of the Decree by depriving the Council of its discretion to ensure that the housing would be consistent with the character of the neighborhoods. Contrary to the Court of Appeals' view, the District Court did not merely enforce the terms of the Consent Decree, but instead extended the supposed obligations of the councilmen beyond those imposed by the Consent Decree.

A court can enforce only the terms of a consent decree that the parties explicitly agreed to, and cannot vary the decree by adding, deleting, or altering its provisions. *Local Number 93, International Assoc. of Firefighters v. City of Cleveland*, 478 U.S. 501 (1986); *United States v. ITT Continental Baking Co.*, 420 U.S. 223 (1975); *United States v. Armour & Co.*, 402 U.S. 673 (1971).[9] Parties enter into a consent decree after carefully negotiating agreement on its "precise terms." *United States v. Armour & Co.*, 402 U.S. at 681.

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[9] The only exceptions to this rule are inapplicable here. These exceptions are that a court may modify a consent decree over the objections of one of the parties where a change in the law brings the decree's terms into conflict with the statute pursuant to which the decree was entered, or there have been changed circumstances which would frustrate the parties' purposes if the decree were not modified. *Local 93, International Assoc. of Firefighters Local Union No. 1784 v. Stotts*, 467 U.S. 561, 576 n.9 (1984); *System Federation No. 9 v. Wright*, 364 U.S. 642, 646-47 (1961). Here, there have not been any changed circumstances or changes in the law.

> [I]t is the agreement of the parties rather than the force of the law upon which the complaint was originally based, that creates the obligations embodied in a consent decree.

Local Number 93, International Assoc. of Firefighters, 478 U.S. at 522. The scope of a consent decree should be narrowly construed because to do otherwise implicates due process rights.

> Because the defendant has, by the decree, waived his right to litigate the issues raised, a right guaranteed to him by the Due Process Clause, the conditions upon which he has given that waiver must be respected, and the instrument must be construed as it is written, and not as it might have been written.

United States v. *Armour & Co.*, 402 U.S. at 682.

The Ordinance was primarily a zoning ordinance. It explicitly amended Yonkers' existing zoning ordinance, Yonkers Code, *Zoning*, Chapter 107, Appendix p. 532, and made substantive zoning changes to increase land use densities, for example, *Id.* at 534, notwithstanding any provision of the existing zoning law to the contrary. *Id.* at 548. "[Z]oning, when used to preserve the character of specific areas of a city, is perhaps 'the most essential function performed by local government, for it is one of the primary means by which we protect that sometimes difficult to define concept of quality of life.' " *Young* v. *American Mini Theatres, Inc.*, 427 U.S. 50, 80 (1976) (Powell, J., concurring), *reh'g denied*, 429 U.S. 873 (1976) [*quoting Village of Belle Terre* v. *Boraas*, 416 U.S. 1, 13 (1974) (Marshall, J., dissenting)]. *See RRI Realty Corp.* v. *Village of Southhampton*, No. 88-7441, slip op. (2d Cir. Mar. 29, 1989) (federal courts are not to become zoning boards of appeals); *Rogin* v. *Bensalem Township*, 616 F.2d 680, 698 (3d Cir. 1980), *cert. denied*, 450 U.S. 1029 (1981) ("local political bodies are better able than federal courts to assess the benefits and burdens of [zoning] legislation").

The Consent Decree preserved in the Council the right to adopt only zoning changes that "are not substantially inconsistent with the character of the area." Appendix p. 222. The Ordinance, on the other hand, gave the power to consider the impact of zoning changes on the surrounding community to the Office of Implementation and the Yonkers Planning Board. The Council never agreed to give up its discretion. *Compare* Appendix p. 222 *with* Appendix pp. 549-56.

The District Court deprived the councilmen, without their consent, of their traditional police power, explicitly reserved to them in the Consent Decree, "to lay out zones where family values, youth values, and the blessings of quiet seclusion and clean air make the area a sanctuary for people." *Village of Belle Terre v. Boraas*, 416 U.S. at 9.

The Court of Appeals was wrong when it framed the issue as one involving an obligation undertaken and later repudiated. 856 F.2d at 457. By removing all discretion from the Council, the July 26, 1988 order went so far beyond the Consent Decree that the invocation of the contempt power to coerce the enactment of the legislation was improper.

CONCLUSION

For the reasons stated above, the judgment of the Court of Appeals for the Second Circuit should be reversed.

Dated: New York, New York
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Respectfully submitted,
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STATUTORY APPENDIX

28 U.S.C. § 1254

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree; . . .

Fed. R. Civ. P. 52(a)

. . . Findings of fact, whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses. . . .